Supreme Court, U.S.
FILED

04108 4 FEB 10 2005

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO
DO VEGETAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

PATRICIA A. MILLETT
Assistant to the Solicitor General

MICHAEL JAY SINGER
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, requires the government to permit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance, where Congress has found that the substance has a high potential for abuse, it is unsafe for use even under medical supervision, and its importation and distribution would violate an international treaty.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Alberto R. Gonzales, Attorney General of the United States, Karen P. Tandy, Administrator of the United States Drug Enforcement Administration, John W. Snow, Secretary of the Treasury, David C. Iglesias, United States Attorney for the District of New Mexico, and Hugo Martinez, Acting Resident Special Agent in Charge of the United States Customs Service Office of Criminal Investigation, Albuquerque, New Mexico.

The respondents are O Centro Espirita Beneficiente Uniao Do Vegetal (USA), a New Mexico Corporation, Jeffrey Bronfman, Daniel Tucker, Christina Barreto, Fernando Barreto, Christine Berman, Mitchel Berman, Jussara de Almeida Dias, Patricia Domingo, David Lenderts, David Martin, Maria Eugenia Pelaez, Bryan Rea, Don St. John, Carmen Tucker, and Solar Law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions and treaty involved	2
Statement	2
Reasons for granting the petition	13
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *ACLU*, 124 S. Ct. 2783 (2004)	25
Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002)	19
City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000)	24
Department of the Navy v. *Egan*, 484 U.S. 518 (1988)	24
Employment Div., Dep't of Human Res. v. *Smith*, 494 U.S. 872 (1990)	14, 15, 16
Leary v. *United States*, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969)	17
Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001)	25
Marshall v. *United States*, 414 U.S. 417 (1974)	21
Morton v. *Mancari*, 417 U.S. 535 (1974)	26
National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989)	24
Olsen v. *DEA*, 878 F.2d 1458 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990)	14, 17
Olsen v. *Iowa*, 808 F.2d 652 (8th Cir. 1986)	14
Saenz v. *Roe*, 526 U.S. 489 (1999)	25
Sherbert v. *Verner*, 374 U.S. 398 (1963)	15

Cases—Continued: Page

Turner Broad. Sys., Inc. v. *FCC*:
512 U.S. 622 (1994) 20
520 U.S. 180 (1997) 20
United States v. *Brown*, No. 95-1616, 1995 WL 732803 (8th Cir. Dec. 12, 1995) (Mem.), cert. denied, 517 U.S. 1174 (1996) 14
United States v. *Greene*, 892 F.2d 453 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990) 14, 17
United States v. *Israel*, 317 F.3d 768 (7th Cir. 2003) 14, 17
United States v. *Lee*, 455 U.S. 252 (1982) 15
United States v. *Merkt*, 794 F.2d 950 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987) 15
United States v. *Middleton*, 690 F.2d 820 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983) 15, 17, 20
United States v. *Nixon*, 418 US. 683 (1974) 24
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 19, 20, 25, 26, 27
United States v. *Rush*, 738 F.2d 497 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985) 15, 17
United States v. *Spears*, 443 F.2d 895 (5th Cir. 1971), cert. denied, 404 U.S. 1020 (1972) 15, 17
Virginian Ry. v. *System Fed'n No. 40*, 300 U.S. 515 (1937) 20

Constitution, treaty and statutes:

U.S. Const.:
Amend. I 6, 17
Amend. IV 6
Amend. V 6
United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175: 2
Preamble 3
Art. 1(f)(i), 32 U.S.T. at 546 ..... 3, 21
Art. 2, para. 4(b), 32 U.S.T. at 547 ..... 3, 21

Treaty and statutes—Continued: Page

Art. 3, para. 1, 32 U.S.T. at 551 3
Art. 7, 32 U.S.T. at 554 4
Art. 7(a), 32 U.S.T. at 553 4
Art. 7(f), 32 U.S.T. at 554 4
Art. 12(1)(a), 32 U.S.T. at 556 4
Art. 32, 32 U.S.T. at 570 23
Art. 32, para. 4, 32 U.S.T. at 570 4
Appended List of Substances in the Schedules, 32 U.S.T. at 734 ..... 3, 21
Controlled Substances Act, 21 U.S.C. 801 *et seq.* 2
21 U.S.C. 801(2) 2
21 U.S.C. 801a(1) 22
21 U.S.C. 801a(2) 22
21 U.S.C. 811 ..... 3, 17
21 U.S.C. 811(d) 22
21 U.S.C. 812(b) 2
21 U.S.C. 812(b)(1)(A)-(C) 2
21 U.S.C. 812(c) 3
21 U.S.C. 841(a)(1) 2
21 U.S.C. 844(a) 2
Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title I, § 101, 92 Stat. 3768 22
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 2, 4, 13
42 U.S.C. 2000bb(a)(5) 5, 16, 26
42 U.S.C. 2000bb(b)(1) 4, 15
42 U.S.C. 2000bb-1(b) 4
42 U.S.C. 2000bb-3(a) 4
25 U.S.C. 2901(1) 26
42 U.S.C. 1996a(a)(1) 26
42 U.S.C. 1996a(a)(5) 26
42 U.S.C. 1996a(b)(1) 26
42 U.S.C. 1996a(c)(1) 26

Miscellaneous:

H.R. Rep. No. 88, 103d Cong., 1st Sess. (1993) 16

Miscellaneous—Continued: Page

Office of Nat'l Drug Control Policy, *Drug Facts: Hallucinogens* (visited Feb. 9, 2003) <http://www.whitehousedrugpolicy.gov/drugfact/hallucinogens/index.html> 28
Bill Rankin, *Trial Ordered in Case of Hallucinogenic Plants*, Atl. J. Const., Oct. 24, 2002, at F3 27
Rise in Ecstasy Use Among American Teens Begins to Slow, Univ. of Mich. News & Info. Servs., Dec. 19, 2001 <http://umich.edu/~newsinfo/Releases/2001/Dec01/r121901d.html> 28
S. Rep. No. 959, 95th Cong., 2d Sess. (1978) 22
S. Rep. No. 111, 103d Cong., 1st Sess. (1993) 16

In the Supreme Court of the United States

No.

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO
DO VEGETAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of Attorney General Alberto R. Gonzales and the other federal defendants, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-120a) is reported at 389 F.3d 973. The panel opinion of the court of appeals (Pet. App. 121a-167a) is reported at 342 F.3d 1170. The opinion of the motions panel granting a stay pending appeal (Pet. App. 168a-174a) is reported at 314 F.3d 463. The opinion of the district

court (Pet. App. 177a-246a) is reported at 282 F. Supp. 2d 1236.

JURISDICTION

The en banc court of appeals entered its judgment on November 12, 2004. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND TREATY INVOLVED

The 1971 United Nations Convention on Psychotropic Substances, the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, and relevant portions of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, are reproduced at Pet. App. 272a-333a.

STATEMENT

1. a. The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, makes it unlawful to possess or to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, except as authorized by the Act itself. 21 U.S.C. 841(a)(1), 844(a). Congress found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. 801(2).

The Act classifies controlled substances based on the drug's safety, the extent to which it has an accepted medical use, and its potential for abuse. See 21 U.S.C. 812(b). Congress directed the placement of a drug on Schedule I of the Controlled Substances Act if it has "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1)(A)-(C). Congress

separately provided an administrative procedure by which the Attorney General may consider new evidence bearing on a drug's proper classification level and may, if warranted, add, transfer, or remove drugs from the Schedules. See 21 U.S.C. 811. Congress has designated dimethyltryptamine (DMT), as well as "any material, compound, mixture, or preparation, which contains any quantity of [DMT]," as a Schedule I controlled hallucinogen, 21 U.S.C. 812(c), and DMT has not been administratively rescheduled.

b. The 1971 United Nations Convention on Psychotropic Substances represents an international effort, involving more than 160 signatory Nations, "to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise." United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, Preamble. The Convention lists DMT as a Schedule I substance because it is considered particularly unsafe and lacks valid medical uses. *Id.* Art. 2, para. 4(b); *id.* Appended Lists of Substances in the Schedules. Under the Convention, "a preparation is subject to the same measures of control as the psychotropic substance which it contains." *Id.* Art. 3, para. 1. The Convention defines "preparation" to mean "any solution or mixture, in whatever physical state, containing one or more psychotropic substances." *Id.* Art. 1(f)(i).

For Schedule I substances and preparations, like the DMT-laden hoasca at issue here, parties to the Convention must "prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them," and must stringently

regulate both import and export of the controlled substance. Convention Arts. 7(a) and (f), 12(1)(a).

The Convention permitted signatories, at the time they joined the Convention, but not thereafter, to make "reservations" excepting a substance from Article 7 if the substance arises from a native-grown plant that is "traditionally used by certain small, clearly determined groups in magical or religious rites." Convention Art. 32, para. 4. Such reservations apply solely to domestic use of the substance; they do not extend to international trade in the controlled substance. *Ibid.* The plants used to manufacture hoasca are not grown within the United States, and the United States made no reservation for DMT at the time it joined the Convention.

c. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that the federal government "shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b). RFRA applies to "all Federal law" and the implementation of that law, "whether statutory or otherwise," adopted both before and after the passage of RFRA. 42 U.S.C. 2000bb-3(a). The purpose of RFRA was to restore, as a matter of statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). In so doing, Congress found that application of that test "as set forth in prior Federal court rulings" strikes a "sensible balance[]

between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5).

2. Members of a group known as O Centro Espirita Beneficiente Uniao Do Vegetal (UDV) engage in religious ceremonies involving the ingestion of a tea-like mixture referred to as "hoasca." Pet. App. 126a. The tea is made by brewing together two Brazilian plants: *psychotria viridis*, a plant that contains DMT, and *banisteriopsis caapi*, a plant that contains certain alkaloids to suppress enzymes that would otherwise block DMT's hallucinogenic effects. *Id.* at 127a. Studies of both DMT and "ayahuasca" (the general name for hoasca and other orally ingested preparations containing DMT and enzyme inhibitors), including reports by the "Medical-Scientific Department" of UDV, have documented significant adverse psychological effects arising from ingestion of the substance, such as the relapse of depression, intense anxiety and disorientation, and various forms of psychosis. Gov't C.A. App. 217, 223, 363-415. Because its component plants do not grow in the United States, hoasca must be prepared overseas and imported into the United States. Pet. App. 127a.

In May 1999, United States Customs inspectors intercepted a shipment from Brazil to UDV of three drums labeled "tea extract." Pet. App. 127a. Testing revealed that the substance contained DMT. Further investigation revealed that UDV had received fourteen prior shipments labeled as "herbal tea extract" between 1995 and 1998. Pltf. Mot. for Prelim. Inj., Exh. L ¶ 11. On the relevant import forms, UDV officials consistently failed to disclose that the hoasca contained DMT, labeling it instead as a "herbal tea" and a "health supplement." Gov't C.A. App. 91-92, 342-358. A subsequent search of the residence of Jeffrey Bronfman, the

head of UDV, resulted in the seizure of approximately 30 gallons of hoasca. Pet. App. 127a.

3. The UDV, Bronfman, and several other UDV members (collectively, UDV) brought this action against the Attorney General, the Drug Enforcement Administration, the United States Customs Service, and the Department of the Treasury, seeking, *inter alia*, an injunction prohibiting the federal government from enforcing the criminal laws against importing, possessing, and using DMT in the form of hoasca and from seizing the hoasca. Pet. App. 122a-123a. The complaint alleged violations of UDV members' First, Fourth, and Fifth Amendment rights, and their statutory rights under the Religious Freedom Restoration Act, the Administrative Procedure Act, and international laws and treaties, and sought a preliminary injunction. *Id.* at 123a.

After conducting an evidentiary hearing on the health risks associated with ceremonial use of hoasca and the risk of diversion to illicit uses, the district court granted UDV's motion for a preliminary injunction. Pet. App. 247a-260a. Despite the preliminary nature of the ruling, the court stated that, "given the breadth of the parties' briefing" and the "extensiveness of the argument and evidence presented at the hearing, it seems appropriate to consider the substance of Plaintiffs' claims at this time." *Id.* at 183a.

The court then stated that it was "struck by the closeness of the questions of fact presented in this case," and indicated that the risks identified by the government would be sufficient to support prohibition of hoasca "in other contexts." Pet. App. 227a. More specifically, with respect to the health risks posed by hoasca, the court found that the evidence presented "is essentially, in equipoise." *Ibid.* In light of the "close-

ness of th[at] question," the district court stated that the government had not carried "its onerous burden of establishing a health risk to UDV members." *Ibid.* The court further found that the parties "have presented virtually balanced evidence on the risk of diversion issue," which similarly led the court to conclude that the government "has failed to meet its difficult burden of showing a compelling interest in preventing the diversion of hoasca to illicit use." *Id.* at 236a.

The district court rejected the government's argument that compliance with the 1971 Convention was a compelling interest because, in the court's view, the Convention "does not apply to the hoasca tea used by the UDV." Pet. App. 242a. Finally, the court concluded that, although "the Government has presented a great deal of evidence suggesting that hoasca may pose health risks to UDV members and may be subject to diversion to non-religious use," the balance of harms "tips in the Plaintiffs' favor" due to "the closeness of the parties' evidence." *Id.* at 244a.

The injunction issued by the district court prohibits the government "from directly or indirectly treating [UDV's] importation, possession, and distribution of hoasca for use in bona fide religious ceremonies of the UDV as unlawful under the Controlled Substances Act." Pet. App. 248a. The injunction also required UDV to apply for registration to import and distribute hoasca in accordance with federal regulations, but required the Drug Enforcement Agency to issue a registration certificate within 30 days of receipt of UDV's application. *Id.* at 255a. At that time, "the UDV may resume its religious services using the hoasca presently in its possession" and may "import and distribute hoasca immediately upon issuance of the applicable registrations." *Id.* at 255a-256a. Finally, the

injunction imposed elaborate procedures that require the government to coordinate with UDV "persons of authority" in its ongoing efforts to regulate the importation and distribution of hoasca and to reduce the risk of diversion. *Id.* at 250a-259a.

4. The court of appeals granted the government's motion to stay the district court's injunction pending appeal. Pet. App. 168a-174a. In its published decision, the court of appeals held that "the district court's conclusion that the 1971 Convention on Psychotropic Substances does not extend to hoasca is in considerable tension with the language of that Convention." *Id.* at 171a. The court also observed that "the district court's factual findings are in considerable tension with (if not contrary to) the express findings in the [Controlled Substances Act]" that any mixture containing DMT has a "high potential for abuse," "has no currently accepted medical use," and has a "lack of accepted safety." *Ibid.* The court further noted that "[c]ourts have routinely rejected religious exemptions from laws regulating controlled substances employing tests similar to that required by RFRA." *Id.* at 172a.

A divided panel of the court of appeals subsequently affirmed the district court's injunction. Pet. App. 121a-167a. The majority acknowledged that, where a party seeks a preliminary injunction that alters the status quo, the right to relief must be proven "heavily and compellingly." *Id.* at 132a. The majority held, however, that the status quo in this case was "the time when the plaintiffs were exercising their religious freedoms before the government enforced the [Controlled Substances Act] against them." *Id.* at 135a. The majority held that, because the evidence at the preliminary injunction stage was "in equipoise," "the Government failed to satisfy its RFRA burden on the issue of health

and safety risks of hoasca," *id.* at 141a, as well as the risk of diversion, *id.* at 145a. The majority further held that congressional findings that DMT poses an unacceptable risk to public health are "insufficient to satisfy RFRA." *Id.* at 150a. With respect to the Convention's ban on the importation of hoasca, the panel majority held that the government had not demonstrated that compliance with the Convention was the least restrictive means of furthering the government's compelling interest in adhering to international obligations. *Id.* at 147a.

Judge Murphy dissented. Pet. App. 154a-167a. He rejected the majority's analytical approach to preliminary injunctions that alter the status quo, because, under the panel's decision, "any party could establish the status quo by surreptitiously engaging in behavior that violated a statute until discovered by law enforcement authorities and then claiming that it is the enforcement of existing law that amounts to a change in the status quo." *Id.* at 157a-158a n.2. Judge Murphy also would have held that the government suffers irreparable injury when it is enjoined from enforcing its criminal laws, and that injury is exacerbated by the "burdensome and constant official supervision and oversight" of UDV's handling of hoasca required by the preliminary injunction. *Id.* at 160a. Judge Murphy stressed that "Congress has specifically found that the importation and consumption of controlled substances is adverse to the public interest," *id.* at 161a, and a preliminary injunction requiring the United States to violate the Convention "would seriously impede [the government's] ability to gain the cooperation of other nations in controlling the international flow of illegal drugs," *id.* at 162a.

5. a. The court of appeals granted the government's petition for rehearing en banc and affirmed. Pet. App. 1a-120a. A per curiam opinion for the en banc court held that plaintiffs' request for a preliminary injunction seeks to alter the status quo and thus is subject to a more demanding burden of proof, *id.* at 4a-5a, but affirmed issuance of the injunction under that heightened standard, *id.* at 5a.

b. Judge Seymour issued an opinion joined in whole by five judges and in part by two judges. Pet. App. 53a-78a. She would have held that the balance of harms should be the primary focus of the preliminary injunction analysis. *Id.* at 58a. She explained that the district court's issuance of an injunction was proper because, in her view, the harm to the UDV, which is "actually occurring," outweighs the "potential risks" of diversion and threats to health and safety asserted by the government. *Id.* at 74a. Judge Seymour also discounted the harm arising from violation of the 1971 Convention on the ground that, at the time of signature, ratification, or accession to the treaty, the United States could have sought a reservation for indigenous plants "traditionally used by certain small, clearly determined groups in magical or religious rites," from the prohibitions on purely domestic use of controlled substances. *Id.* at 75a.

In a separate opinion, Judge McConnell, joined in whole by one judge and in part by two judges, Pet. App. 79a-119a, agreed with the majority that UDV's request for a preliminary injunction sought to alter the status quo and thus should be required to meet a heightened standard of justification, *id.* at 80a-93a. Judge McConnell then concluded that UDV had satisfied that standard. He distinguished cases rejecting religion-based claims to use marijuana based on the

"popularity of marijuana" and the frequency of its usage, *id.* at 98a, and further reasoned that such factual distinctions "between street drugs and more 'esoteric' ones" counseled against deferring to Congress's statutory findings concerning the dangers associated with DMT, *id.* at 103a. Judge McConnell did not endorse the district court's holding that the Convention does not cover hoasca. Instead, he asserted that a reversal on the basis of the Convention "would go far beyond what the record can support," given that the district court had limited the evidentiary hearing to other matters and therefore excluded an item of evidence described by Judge McConnell as "interpretive history" of the Convention. *Id.* at 104a. Finally, Judge McConnell stated that the government had failed to demonstrate that prohibiting hoasca is the least restrictive means of furthering its interest in compliance with the Convention because, in his view, the United States should seek an international accommodation for hoasca. *Id.* at 104a-107a.

c. Judge Murphy, issued a separate opinion joined in whole by three judges and in part by three other judges. Pet. App. 6a-52a. He agreed with the majority that the preliminary injunction sought by UDV would alter rather than preserve the status quo pending litigation and thus should be granted only upon a clear showing of entitlement to preliminary relief. *Id.* at 6a-18a. Judge Murphy would have held, however, that UDV failed to satisfy that demanding standard of proof. *Id.* at. 19a. Judge Murphy concluded that "the express congressional findings concerning Schedule I drugs" establish that the government has a compelling interest that is being furthered by the least restrictive means. *Id.* at 21a. He rejected the notion that RFRA authorizes the courts to engage in "a case-by-case re-

determination of whether these findings are correct," *id.* at 22a, noting that Congress intended RFRA to restore the same legal test that routinely had been applied to prohibit judicial second-guessing of congressional findings concerning Schedule I drugs, *id.* at 22a-23a. In his view, under RFRA, the government's compelling interest in controlling the use and circulation of Schedule I controlled substances cannot "turn on whether the adherent has a religious affinity for street drugs or more esoteric ones." *Id.* at 27a.

Judge Murphy also concluded that the preliminary injunction requiring the government to violate the Convention "could seriously impede its ability to gain cooperation with other nations in controlling the international flow of illegal drugs." Pet. App. 29a. The dissent further took issue with Judge McConnell's faulting of the government's evidence pertaining to the least restrictive means of complying with the Convention, noting that "the district court short-circuited the government's ability to present evidence on this particular question when it concluded that the Convention did not apply to *hoasca*." *Id.* at 35a. Finally, because the district court found "that it is just as likely as not that *hoasca* will be diverted to the general public and that members of UDV will suffer harm from the consumption of hoasca," the dissent concluded that UDV had failed to show that the balance of harms weighed in its favor. *Id.* at 52a.

d. Judge Hartz wrote a brief dissent expressing his view that UDV is unlikely to succeed on the merits because of the long-recognized compelling interests in uniform application of the Controlled Substances Act and in adhering to the 1971 Convention. Pet. App. 120a.

The court of appeals subsequently denied the government's motion to stay the mandate, with four judges dissenting. Pet. App. 175a-176a. This Court denied the government's motion to stay the injunction pending the filing of a petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals enjoins the federal government from enforcing a longstanding and unquestionably constitutional criminal law that bans the importation, possession, distribution, and use of a Schedule I controlled substance. The opinion also has forced the United States government into an ongoing violation of an international treaty. The court's decision has mandated that the federal government open the Nation's borders to the importation, circulation, and usage of a mind-altering hallucinogen and threatens to inflict irreparable harm on international cooperation in combating transnational narcotics trafficking. And it has imposed those injurious directives based on nothing more than prima facie allegations of a violation of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and the testimony of a few hired experts that conflicts with the considered judgments of Congress and more than 160 other Nations. That extraordinary decision—which is contrary both in outcome and legal analysis to the decision of every other court of appeals to address similar religion-based requests for exemptions from the Nation's drug laws—merits an exercise of this Court's certiorari jurisdiction.

1. a. The court of appeals' decision squarely conflicts with every other court of appeals decision addressing similar religion-based claims for exemptions from the Controlled Substances Act, both under RFRA and

under the strict scrutiny analysis employed in Free Exercise Clause cases before this Court clarified the constitutional test in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990).

In *United States* v. *Israel*, 317 F.3d 768 (2003), the Seventh Circuit held that RFRA does not prohibit the government from revoking the supervised release of an individual who smoked marijuana for religious purposes. In language that is irreconcilable with the Tenth Circuit's (fractured) analysis here, the Seventh Circuit held that "[w]hether the government has a compelling interest in preventing drug abuse can hardly be disputed," and that "Congress' inclusion of marijuana as a Schedule I controlled substance makes clear [its] belief that Israel's drug of choice is a serious threat to the public health and safety." *Id.* at 771. In light of the "impressive amount of legislative and judicial reasoning" from Congress and pre-*Smith* decisions, the Seventh Circuit determined "that the government has a proper and compelling interest in forbidding the use of marijuana." *Ibid.* "Any judicial attempt to carve out a religious exemption in this situation," the court concluded, "would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions." *Ibid.*

Other courts of appeals have reached the same conclusion. See *United States* v. *Brown*, No. 95-1616, 1995 WL 732803, at *2 (8th Cir. Dec. 12, 1995) (Mem.), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Greene*, 892 F.2d 453, 456-457 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); *Olsen* v. *DEA*, 878 F.2d 1458 (D.C. Cir. 1989) (R. B. Ginsburg, J.), cert. denied, 495 U.S. 906 (1990); *Olsen* v. *Iowa*, 808 F.2d 652 (8th Cir. 1986);

United States v. *Merkt*, 794 F.2d 950, 954-955 (5th Cir. 1986) (citing cases), cert. denied, 480 U.S. 946 (1987); *United States* v. *Rush*, 738 F.2d 497, 512 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); *United States* v. *Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); *United States* v. *Spears*, 443 F.2d 895 (5th Cir. 1971), cert. denied, 404 U.S. 1020 (1972).

In addition, Justice O'Connor, in her concurrence in the judgment in *Smith*, explained that the heightened scrutiny standard applied in cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963), did not compel Oregon to grant an exemption from its drug laws for the sacramental use of peyote. *Smith*, 494 U.S. at 903-907. Justice O'Connor concluded that no one could "seriously dispute" the government's "compelling interest in prohibiting the possession of peyote by its citizens." *Id.* at 905. Furthermore, Justice O'Connor found that "uniform application" of the prohibition was "essential to accomplish" the government's "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance," and "is essential to the effectiveness" of "preventing trafficking in controlled substances." *Ibid.* In so concluding, Justice O'Connor eschewed the very analytical framework adopted by the court of appeals here and the *Smith* dissent, *id.* at 911-914, and determined that piecemeal judicial attrition of the comprehensive ban on Schedule I substances would "unduly interfere with fulfillment of the governmental interest," and thus is not a viable less restrictive means, *id.* at 905 (O'Connor, J., concurring in the judgment) (quoting *United States* v. *Lee*, 455 U.S. 252, 259 (1982)).

Congress, moreover, intended RFRA to impose a test consistent with precedent predating the *Smith*

decision, which had uniformly rejected similar claims to use controlled substances. See 42 U.S.C. 2000bb(a)(5) and (b)(1); H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993). As Justice O'Connor explained in *Smith*, because the "health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them." 494 U.S. at 905. In enacting RFRA, Members of Congress specifically endorsed Justice O'Connor's concurrence in *Smith* as reflecting the proper mode of analysis under the statute. H.R. Rep. No. 88, *supra*, at 4 n.10.

b. Congress and the more than 160 signatories to the 1971 Convention have uniformly concluded that the importation, distribution, and use of DMT-based substances like hoasca constitute significant threats to public health and safety and are not safe for use even under medical supervision. At the heart of the court of appeals' analysis is the legal presupposition that RFRA licenses courts to dismiss that broad legislative consensus in favor of the opinions of a handful of hired witnesses, most of whom were either members of UDV and thus prospective users of hoasca themselves or conducted research funded by the head of UDV, respondent Bronfman. See Pet. App. 95a-96a; see also 10/23/01 Tr. 376-377; 10/24/01 Tr. 515-516; 10/30/01 Tr. 1228-1231; 10/31/01 Tr. 1311.

Other courts of appeals have reached the exact opposite conclusion by applying a different legal standard —they have held that the compelling interest test does not permit a court, at the behest of a religious adherent, to revisit de novo Congress's determination that a certain substance placed on Schedule I is so profoundly

harmful that it is not even safe for use under medical supervision (let alone unregulated religious ceremonies). See, *e.g.*, *Israel*, 317 F.3d at 771; *Greene*, 892 F.2d at 456-457 ("Every federal court that has considered this issue has *accepted Congress' determination* that marijuana poses a real threat to individual health and social welfare and has upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion.") (emphasis added); *id.* at 455 (court refuses to sit as a "superlegislature" to review congressional classification of Schedule I substances); *Rush*, 738 F.2d at 512 ("Every federal court that has considered the matter * * * has *accepted the congressional determination* that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion.") (emphasis added); *Olsen* v. *DEA*, 878 F.2d at 1462 (same as *Rush*); *Middleton*, 690 F.2d at 825-826; *Spears*, 443 F.2d at 896; *Leary* v. *United States*, 383 F.2d 851, 860-861 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969).

That heretofore long-established principle of judicial respect for legislative factfinding is particularly appropriate in the context of the Controlled Substances Act, because Congress already has provided an administrative mechanism for an expert agency—not any one of nearly 700 different federal district court judges—to consider any new evidence bearing on DMT's proper classification. See 21 U.S.C. 811. Until that process is successfully invoked, Congress's classification of DMT as a Schedule I substances reflects a congressional judgment that there is a compelling interest in main-

taining a *categorical* prohibition on the public use of DMT.

The court of appeals—unlike every court of appeals before it—fundamentally disregarded Congress's expert judgment that Schedule I controlled substances have profoundly adverse health effects and an elevated potential for abuse and diversion. More than 160 Nations share that judgment. Those health effects and potential for abuse necessarily satisfy the compelling interest and least restrictive means test. The uniform refusal of other courts to revisit that legislative conclusion under RFRA or the First Amendment reflected the commonsense judgment that neither the physiological dangers posed by a Schedule I substance nor the societal forces that cause illicit diversion depend upon whether the prospective drug users' motives are religious or secular.

Nor do those interests diminish just because, as Judge McConnell reasoned, Pet. App. 97a-98a, hoasca-based DMT is not yet as popular in the drug culture as marijuana. If the injunction stands, scores if not hundreds of persons, including minors, 10/22/01 Tr. 31, will continue to ingest DMT and will continue to put their physical and psychic well-being in serious jeopardy, as even the district court recognized. Pet. App. 244a. Such serious health risks need not number in the thousands before a compelling interest arises.

Furthermore, the whole point of the Controlled Substances Act and the 1971 Treaty is to prevent dangerous narcotics from being abused at high levels by the general population. Congress has just as much of a compelling interest in preventing such illegal drug markets from emerging or expanding in the first place, as it has in combating those that already exist. Indeed, the fact that hoasca must be imported and has not yet

become a primary staple in the illicit drug market underscores the serious and irreparable harm that could attend court-ordered importation and court-sanctioned usage, with their attendant risks of diversion, increasing public familiarity with hoasca as a delivery system for DMT, and fueling the development of a new market for yet another dangerous, mind-altering hallucinogen on the Nation's streets. See *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 264 (2002) ("[T]his Court's cases do not require Congress to wait for harm to occur before it can legislate against it."). RFRA does not compel the government to sit on the sidelines until DMT-based hoasca becomes as widely abused as LSD and its illicit marketing system as well-entrenched. Cf. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (unanimously rejecting the argument that a court's equity powers include creating special exceptions to Schedule I restrictions for marijuana).

In short, the volume and depth of contrary circuit precedent establish that this case would come out differently were it litigated in the First, Fifth, Sixth, Seventh, Eighth, Eleventh, or District of Columbia Circuits. Yet, as it stands, the district court's injunction permits hoasca-based DMT to be used by UDV branches not just within the Tenth Circuit, but also in Washington, California, and Florida. See Pet. App. 248a-249a; Pltf. Mot. for Prelim. Inj., Exh. A. Comprehensive and uniform nationwide enforcement of the criminal laws prohibiting the importation, distribution, possession, and use of controlled substances is essential, making prompt resolution of this inter-circuit conflict imperative.

2. To the extent that RFRA may permit some probing of the evidentiary record supporting Congress's judgment to regulate a controlled substance under

Schedule I, the court of appeals committed further error by disregarding this Court's decision in *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 195, 211-212 (1997). To grant UDV relief, the court of appeals, at bottom, had to reject the congressional finding that there is no such thing as a safe use of DMT by members of the public. However, *Turner* made clear that, even in cases involving constitutional rights, courts "must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665-666 (1994). Where such factual judgments are at issue, a reviewing court's "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Turner Broad. Sys.*, 520 U.S. at 195. Courts "are not to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [their] own," and "are not at liberty to substitute [their] judgment for the reasonable conclusion of a legislative body." *Id.* at 211-212.

If, as the district court found, the evidence is in "equipoise," Pet. App. 227a, that alone establishes that substantial evidence supports Congress's determination that DMT poses an unacceptable risk of harm, and the court of appeals, "sitting in equity * * * cannot 'ignore the judgment of Congress, deliberately expressed in legislation'" and "cannot, in [its] discretion, reject the balance that Congress has struck in a statute." *Oakland Cannabis*, 532 U.S. at 497 (quoting *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 551 (1937)); see also *Middleton*, 690 F.2d at 822 (applying *Turner*-type legal standard of review for congressional fact finding to free exercise claim for religious exemption from Controlled Substances Act). The existence of reasonable scientific disagreement validates, rather

than undermines, Congress's determination. See *Marshall* v. *United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices."). The Tenth Circuit's determination that evidentiary equipoise is a sufficient basis for discarding legislative fact finding thus cannot be reconciled with *Turner* and directly conflicts with the legal standard applied by the Eleventh Circuit in *Middleton*.

3. The court of appeals' decision merits this Court's review because it has commanded an ongoing violation of an international treaty that is vital to the United States' effort to combat transnational narcotics trafficking. The 1971 Convention on Psychotropic Substances forbids the importation and domestic distribution of DMT and "any solution or mixture, in whatever physical state, containing one or more psychotropic substances" including DMT. See Convention Arts. 1(f)(i), 2 para. 4(b); *id.* Appended Lists of Substances in the Schedules. There is no dispute that hoasca is a "solution or mixture," nor is there any question that hoasca "contain[s]" DMT—a Schedule I substance. By ordering the United States to permit the importation of hoasca from Brazil and hoasca's distribution and use in the United States, the preliminary injunction forces the United States into an immediate and ongoing violation of that important international treaty. Not one judge on the court of appeals disputed that the injunction has that effect.

Underscoring the importance of adherence to the Convention, both as a matter of international relations

and of protecting domestic public health and safety, Congress specifically amended the Controlled Substances Act in 1978 to bring domestic law into compliance with the Convention, 21 U.S.C. 801a(2), and the Act includes elaborate provisions specifically designed to conform federal law to the Convention, see, *e.g.*, 21 U.S.C. 811(d).[1] The legislative record confirms that adhering to the Convention's terms "at home" is critical not just "to reducing the diversion of psychotropic substances," but also to "the prevention of illicit trafficking in other countries" and promoting the United States' "credibility" as a leader in international narcotics law enforcement. S. Rep. No. 959, 95th Cong., 2d Sess. 16 (1978). Congress, moreover, made clear in the text of the Controlled Substances Act itself that cooperation between the United States and other Nations in establishing and enforcing effective controls over international trafficking in DMT and other psychotropic substances is "essential." 21 U.S.C. 801a(1).[2]

---

[1] See generally Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title I, § 101, 92 Stat. 3768.

[2] See also Pet. App. 271a (Dalton Decl.) (explaining that the United States "engages in active diplomatic efforts to promote compliance with the provisions of the United Nations drug conventions, including the 1971 Convention on Psychotropic Substances," and that, "[t]o continue in its strong position of international leadership on this issue, the United States must continue to observe faithfully its treaty obligations under these instruments"); *id.* at 262a (Sheridan Decl.) (explaining that the United States, "relies on the adherence to these treaties by other countries in supporting international cooperative efforts to prevent the illegal exportation, importation, and distribution of substances that are controlled under these treaties"; relating "personal knowledge of situations in which DEA has cited to the obligations that a signatory nation has under the international drug and extradition treaties to support a request for assistance in drug enforcement operations"; and noting that "[t]he international treaties on narcotic drugs and psychotropic substances provide DEA with the authority under international law to seek and receive assistance from other countries that have signed these treaties").

While some judges suggested (erroneously) that there might be (or might have been) avenues under the Convention to permit the use of DMT in hoasca at some past or future time, the simple reality is that there is no viable mechanism for the United States to make an exemption for UDV—and every other RFRA claimant seeking narcotics that follows in the wake of the Tenth Circuit's decision—that would comply with the Convention. Reservations had to be taken at the time the United States ratified the Convention in 1980—which was thirteen years before RFRA and two decades before UDV's lawsuit. See Convention Art. 32. The reservation, moreover, could be made only for the purely *domestic use of native-grown plants*. Reservations do not extend to the import or export of controlled substances—quite the opposite, the Convention explicitly provides that any reservation will not extend to the Convention's "provisions relating to international trade." *Ibid.* That is critical given that hoasca cannot be made in the United States. In light of the Convention's specific and deliberate limitation of reservations to the *domestic* use of *native-grown* plants, while preserving the Convention's categorical prohibition on the import or export of such substances, there is little reason to believe that a different balance—one that allows international trafficking in psychotropic substances—would be struck at this point. Changes that would fuel international demand for non-indigenous psychotropic substances are highly unlikely to be adopted. At the very least, such a balance could

not be struck without a willingness on the part of the United States to compromise on other important international drug-enforcement issues. The only other option at this juncture would be to seek an amendment to the Convention that would ease the prohibitions on importing and distributing psychotropic substances, a hazardous route of international diplomacy that would take years, would open the door to amendments by other Nations, and would potentially unravel the comprehensiveness of the Convention's bans on transnational drug trafficking. See Pet. App. 270a.

In short, there are portentous diplomatic and international law enforcement costs associated with the forced renegotiation of an international treaty in a way that would require the compromise of important objectives and the disruption of longstanding policies. Those costs merit an exercise of this Court's certiorari jurisdiction. Cf. *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("courts have traditionally shown the utmost deference" to the Political Branches' conduct of international relations) (quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)).

4. The question presented here is of pressing and enduring national importance. There can be "no doubt" that the use of controlled substances and trafficking in those drugs, including DMT, "creates social harms of the first magnitude," *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42 (2000), and that drug abuse is "one of the greatest problems affecting the health and welfare of our population," *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 668 (1989).

Those harms—and thus the importance of this Court's intervention—are not diminished by the interlocutory character of the court of appeals' decision. First, as a practical matter, the court of appeals'

decision leaves little if anything to be resolved on remand. The district court already conducted a two-week long hearing on the public health and diversion risks associated with hoasca importation and distribution. While the district court did not conduct a hearing on the Convention, its application to hoasca is a legal question subject to de novo review—and one that is answered by the straightforward text of the Convention itself.

The court of appeals' decision, moreover, did not turn upon a deferential review of record-intensive interest balancing by the district court, but on legal rulings governing RFRA's application, interpretation of the "compelling interest" and "least restrictive means" standards, and allocation of the underlying burdens of proof. The admission of more evidence on remand will not assist in resolving the critical and dispositive *legal* questions that are before the Court and on which the courts of appeals are split. This Court has, in the past, granted review of other preliminary injunctions under similar circumstances. See, *e.g.*, *Oakland Cannabis*, *supra*; *Ashcroft* v. *ACLU*, 124 S. Ct. 2783 (2004); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001); *Saenz* v. *Roe*, 526 U.S. 489 (1999).

Second, and more importantly, the Tenth Circuit's central point of departure from the rulings of other circuits and this Court's precedent is its conclusion that, despite *Turner*, RFRA mandates (i) exhaustive judicial second-guessing of Congress's legislative judgment to classify a narcotic under Schedule I because of its adverse physical effects, lack of accepted usage, and risk of diversion, and does so (ii) within a procedural framework under which congressional findings are presumptively suspect such that the government bears the burden of re-proving the legitimacy of Congress's judg-

ment. The essence of the court of appeals' legal error is its bottom-line conclusion that evidentiary equipoise is enough to support enjoining enforcement of the Nation's drug-control laws, compelling violation of an international treaty, imperiling international cooperation in policing transnational drug trafficking, and forcing the government into a joint venture with a religious establishment to assist its importation and distribution of dangerous narcotics into the United States. Further proceedings under that fundamentally flawed legal framework will simply perpetuate that legal error, while critical time is lost in the government's effort to keep DMT out of the United States, off its streets, and away from its citizens, and while efforts to combat international drug trafficking are further frustrated and impaired.

Third, for 34 years, the Controlled Substances Act has stood as a comprehensive and unyielding bulwark against the use of Schedule I controlled substances by anyone for any reason, other than the tightly controlled and governmentally approved research projects explicitly authorized by the Act. See generally *Oakland Cannabis*, *supra*.[3] Efforts by lower courts to import

[3] The only exception that has been created is 42 U.S.C. 1996a(b)(1) and (c)(1), which permits the ceremonial use of domestically grown peyote by members of federally recognized Indian Tribes. See 42 U.S.C. 1996a(b)(1) and (c)(1). What is telling is that Congress, not the courts, struck that balance, and it did so in light of the government's historic trust obligations to members of Indian Tribes and the unique sovereign status of Indian Tribes. See 25 U.S.C. 2901(1); 42 U.S.C. 1996a(a)(1) and (5); see generally *Morton* v. *Mancari*, 417 U.S. 535 (1974). Moreover, Congress's passage of that law two years *after* it enacted RFRA underscores Congress's view—based on the consistent pre-and post-RFRA case law denying religious claims for exemptions from the Controlled Substances Act that RFRA itself endorsed, 42 U.S.C. 2000bb(a)(5)—that

additional exceptions into the Act have merited this Court's review. See *ibid.*; see also *Ashcroft* v. *Raich*, No. 03-1454 (argued Nov. 29, 2004). The practical and far-reaching implications of the Tenth Circuit's decision to take a tightly closed statutory scheme like the Controlled Substances Act and open it to case-by-case attrition based on any individual assertion of a bona fide religious desire to use drugs likewise warrants an exercise of this Court's certiorari jurisdiction.[4]

Fourth, there is nothing preliminary or reversible about the costs to public health, public safety, and international relations inflicted by the court of appeals' decision. As the district court acknowledged, there is "a great deal of evidence," Pet. App. 244a, that ingestion of hoasca-based DMT poses serious health risks, including the psychotic reactions and permanent psychoses documented in UDV's own evidentiary submissions.[5] The government's interest in averting or stanching that harm—especially for the protection of minors who are now able to ingest DMT-based hoasca—is too important and the potential injuries too irreversible to be endured just for the sake of procedural closure. Further proceedings, if any, will

RFRA alone would not entitle members of Indian Tribes to an exemption from the Controlled Substances Act.

[4] Another group in Oregon is also seeking, under RFRA, an exemption to use ayahuasca imported from Brazil, see Mot. by Santo Daime Church for leave to file amicus curiae brief in support of Pltf. Mot. for Prelim. Inj., and another professed religious adherent has sought to import the plants to make ayahuasca, see *United States* v. *Shoemaker*, No. 1:02-cr-00046-JEC-AJB (N.D. Ga.); see also Bill Rankin, *Trial Ordered in Case of Hallucinogenic Plants*, Atl. J. Const., Oct. 24, 2002, at F3.

[5] See Gov't C.A. App. 334-335, 337-338, 363-364, 376-377, 383, 389-390, 395-396, 401-403, 406-411.

simply perpetuate and compound the legal errors for which the government seeks this Court's review, while, in the meantime, scores of adults and children repeatedly undergo DMT-induced mind-altering and potentially psychosis-inducing episodes.

In addition, the importation of hoasca to the United States, by itself, creates a substantial risk of diversion. Pet. App. 244a. That poses a serious and imminent danger both abroad and at home, because the demand for hoasca in Europe and on the Internet "has risen substantially in recent years," *id.* at 231a, and "[t]here is a *tremendous* amount of curiosity about 'ayahuasca' here in the United States" that respondent Bronfman himself acknowledges, Gov't C.A. App. 360. Indeed, the last decade saw an unprecedented increase in demand for illicit hallucinogenic drugs—a trend that has only recently begun to abate.[6] The court of appeals has now forced the federal government to open the United States' borders and streets to yet another mind-altering hallucinogenic—a type of drug that is of "tremendous" interest to substance abusers and that is readily susceptible to diversion. Waiting for a remand would simply give hoasca more time to take hold in the illicit drug market, and experience teaches that, once an illegal drug takes root in the market, eradication is prolonged and enormously difficult.

Nor can the damage that the court's order inflicts on ongoing international cooperation in combating drug

---

[6] See Pet. App. 231a; Office of Nat'l Drug Control Policy, *Drug Facts: Hallucinogens* (visited Feb. 7, 2003) <http://www.whitehousedrugpolicy.gov/drugfact/hallucinogens/index.html>; *Rise in Ecstasy Use Among American Teens Begins to Slow*, Univ. of Mich. News & Info. Servs., Dec. 19, 2001 <http://www.umich.edu/~newsinfo/Releases/2001/Dec01/r121901d.html>.

trafficking be cabined pending a remand. The United States is, as a result of the court of appeals' decision, now in violation of its obligations under the 1971 Convention. That ongoing situation adversely affects the United States' interests because it directly impairs the effectiveness of international narcotics law-enforcement efforts, frustrates inter-governmental cooperation, and weakens the government's ability to insist that other Countries adhere to their treaty obligations to the United States.

In short, the harm to public health, safety, and international relations caused by the court's decision are harms that, if they are to be averted at all, must be stopped sooner rather than later.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

PATRICIA A. MILLETT
Assistant to the Solicitor General

MICHAEL JAY SINGER
MATTHEW M. COLLETTE
Attorneys

FEBRUARY 2005